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Sup. Ct.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 420

NATHAN A. DOBBINS, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Nathan A. Dobbins, by his attorneys, Cobb, Howard and Hayes, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia rendered in the above captioned cause on June 28, 1946, rehearing of which was denied July 22, 1946.

A.

SUMMARY STATEMENT.

This appeal is from a final judgment and sentence imposed upon the petitioner, Nathan A. Dobbins, by the District Court below, based upon the verdict of a jury finding the petitioner guilty of the crime of embezzlement (and the judgment of the Court of 4 to 15 months in the penitentiary). In Criminal Indictment No. 74642 the petitioner was charged with 23 counts of embezzlement (Title 22, Section 1202, District of Columbia Code 1940), with 23 counts charging false pretenses (Title 22, Section 1301, District of Columbia Code 1940), and with 23 counts of larceny after trust (Title 22, Section 2203, District of Columbia Code 1940), the pertinent language of which said Sections reads as follows:

> "Title 22, Section 1202, District of Columbia Code 1940—If any agent, attorney, clerk, or servant of a private person or copartnership, or any officer, attorney, agent, clerk, or servant of any association or incorporated company, shall wrongfully convert to his own use, or fraudulently take, make way with, or secrete, with intent to convert to his own use, anything of value which shall come into his possession or under his care by virtue of his employment or office, * * *"
>
> "Title 22, Section 1301, District of Columbia Code 1940—Whoever, by any false pretense, with intent to defraud, obtains from any person anything of value * * *."
>
> "Title 22, Section 2203, District of Columbia Code, 1940—That if any person entrusted with the possession of anything of value, including things savoring of the realty, for the purpose of applying the same for the use and benefit of the owner or person, so delivering it, shall fraudulently convert the same to his own use. * * *."

On October 8, 1945, a jury was sworn and respited until October 10, 1945, at which time the trial began. Upon the opening statement being made by the Assistant District Attorney, counsel for petitioner made a motion for a di-

rected verdict on the ground that the opening statement did not state any offenses under any of the headings upon which the indictment was grounded, larceny after trust, embezzlement, or false pretenses (R. p. 17). This motion was overruled (R. p. 18). Counsel for petitioner thereupon made a motion that the Court require the Government to indicate upon which of the offenses it elected to stand (Title 18, par. 557, USCA). This motion was likewise overruled (R. p. 18). Thereupon, an opening statement was made on behalf of petitioner and evidence was offered on behalf of the Government.

Supportive of the Government's case the following evidence was adduced: that Josephine Butler was appointed as Committee of William Butler on, to wit, August 3, 1937, the said William Butler being the father of Grace L. Jones; that Josephine Butler served as Committee of her husband William Butler from, to wit, August 3, 1937 until her death, to wit, August 6, 1941, at which time Grace L. Jones was appointed Substitute Committee for the estate of her father, the said William Butler. That the defendant Nathan A. Dobbins was the attorney for Josephine Butler, and at her death, became attorney for Grace L. Jones, substitute committee. At that time the account was kept in the Second National Bank by Josephine Butler in her capacity as committee. In her capacity as substitute committee, the Second National Bank paid over to Grace L. Jones the sum of, to wit, $90.00, which in turn was turned over to petitioner, either directly or through someone in his office. Subsequently thereto a check in the sum of $285.88 was received by Grace L. Jones, being an accumulation of four checks, which she either turned over to the petitioner or someone in his office. Thereafter she turned over to the petitioner twenty-two checks, each in the amount of $71.47. This money was turned over to him for safekeeping for the substitute committee, at her instance. Out of each of these checks the sum of $15.00 was returned to the said substitute committee, Grace L. Jones for the care and keep of her ward, the said William Butler.

In the meantime, and subsequent to the receipt of the check for $285.88, Grace L. Jones received four checks, each for $71.47 which she cashed and used for her own personal benefit. On January 16, 1944 the said lunatic, William Butler died. One check in the sum of $71.47 subsequently received by Grace L. Jones as substitute committee was returned by her to the Government as her relationship as substitute committee had ceased. Subsequently thereto, and in February 1944 the petitioner filed an application to have Grace L. Jones appointed as administratrix of the estate of her father, William Butler. The application was not consummated, the reason given by the petitioner being that the bonding company refused to go on her bond because he was her attorney and he, the petitioner, was having domestic troubles which were in litigation in the District Courts.

Subsequently thereto, and on, to wit, April 6, 1945, Grace L. Jones was appointed as administratrix, and upon demand, she was paid in full $1300.00. Also the fee of the Auditor, paid by the bonding company in the amount of $200.00, was paid by petitioner.

The 23 checks received by the petitioner were either cashed by him or deposited by him in his own personal account. During the time of the reception of these checks, or the money from them, by the petitioner, and at no time prior to the time of the appointment of the said Grace L. Jones as administratrix of the estate was any demand made by the said Grace L. Jones (R. p. 48). The record further discloses that upon demand being made by the said Mrs. Jones in her capacity as administratrix, the aforementioned amount of $1300.00 was paid over to her (R. p. 49). She further testified that no complaint was ever made by her for the nonpayment of this money (R. p. 70).

This was all the material testimony introduced by the Government on the theory of embezzlement except as to the cashing, depositing or spending of these checks. Motion was made to direct a verdict in behalf of the defendant on all counts of the indictment (R. p. 95). A motion was

granted to strike the counts having to do with larceny after trust and false pretenses (R. pp. 95, 96). A motion for a directed verdict on the remaining counts having to do with embezzlement was made and overruled, with exceptions noted (R. p. 96).

Thereupon defendant offered evidence. In his own behalf he testified that no demand ever had been made, and that he had at all times, from the time when any amount was turned over to him by Mrs. Jones, an amount on hand more than sufficient to return to the said Grace L. Jones any and all such amounts as had been turned over to him by her to keep (R. p. 101). There was further testimony tending to show that he had a one-seventh interest in an estate valued at $42,500.00, which was available to him (R. pp. 155, 195).

As before indicated, upon qualification of the said Grace L. Jones as administratrix, the petition for whose appointment had been made by Nathan A. Dobbins, the money was paid over to Mrs. Jones as administratrix of her father's estate. Petitioner's testimony was corroborated by Zara Hamilton, his sister, who testified she had in her possession $1500.00 which had been turned over to her by petitioner for safe keeping (R. pp. 192, 193). Further she corroborated the fact that petitioner had a one-seventh interest in a $42,500.00 estate which was available to him at all times (R. p. 195).

Petitioner's testimony was that he was the attorney for Grace L. Jones at all times during her administration as substitute committee of her father's estate, but that the money was turned over to him, at her direction, to keep for her and was to be returned to her upon her demand (R. p. 100), but with respect to the funds involved, he simply acted as custodian at her instance, having first indicated an unwillingness to assume this responsibility (R. pp. 99, 100).

Over objection of counsel, testimony in rebuttal was offered on behalf of the Government to the effect that prior to, during the time, and subsequent to the time of the alleged

embezzlements the petitioner was borrowing money from various sources and had an account in the bank on various occasions of less than the amount involved in the indictment. In every instance testimony disclosed that all monies borrowed were repaid (R. p. 226, et seq.).

The petitioner testified that owing to family difficulties, and at the persuasion of his sister and with a view of looking over the field in South Carolina, he visited his home in Charleston, South Carolina, looking forward to the possibility of engaging in the practice of law in that jurisdiction. While there he was taken ill and was under the doctor's care. In this circumstance he was corroborated by the testimony of his sister. While in South Carolina, petitioner testified that for the first time a rumor came to his attention that there was some difficulty in Washington having to do with some legal matters he was handling. Immediately thereafter he got in touch with Attorney John H. Wilson, who advised him not to worry, that he, Mr. Wilson, was handling everything on this end, and it was not until sometime subsequently, until, to wit, January 5, 1945, that Mr. Wilson advised by letter that he had been indicted, suggesting his return to Washington, and that pursuant to that suggestion and while he was in the act of preparing to immediately return to this jurisdiction he was apprehended by South Carolina authorities. Defendant testified in this connection that during the entire time of his stay he had been at the home of his parents, 88 Spring Street, Charleston, South Carolina, which home had been maintained since his early boyhood, and that at the time of his apprehension he was in the act of having his car greased and tires checked, in order to make the return trip to Washington. Further he testified that he was arrested and shortly thereafter he was released on bail, and two weeks later returned to Washington with his wife, two children, and his sister (R. pp. 115, 116, 117).

During the proceedings in this case, and while the petitioner—the first witness on behalf of the defense, was on the

stand under cross-examination, a Juror sent to the Court a written questionnaire, prejudicial to the petitioner's interest.

B.

JURISDICTION.

A timely petition for rehearing was filed. Rehearing was denied July 22, 1946. Record, page 283.

The jurisdiction to review the cause by writ of certiorari is conferred upon this Court by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Section 347(a)).

C.

QUESTIONS PRESENTED.

1. Did the opening statement of the United States Attorney charge any crime under the indictment upon which this defendant could be held under Title 22, Sections 1202, 1301 and 2203 of the District of Columbia Code, 1940 Edition (R. p. 14-17)?

   (a) Was it not error to have allowed an opening statement, uncorrected though the opportunity was given so to do, to stand which did not meet the requirements of the embezzlement statute, the statute upon which the defendant was subsequently convicted? (R. pp. 14-19).

2. Was it not abuse of discretion on the part of the Court in refusing to require the Government to elect as to which of the charges under the indictment; that is to say, 23 counts charging embezzlement, 23 counts charging false pretenses, and 23 counts charging larceny after trust, the Government intended to stand on, thus confounding and embarrassing the defendant in his attempt to properly defend himself (R. p. 18), and likewise to the apparent confusion of the jury (R. p. 143)?

3. Did not the Court err in overr ing defendant's objection to the testimony of Marjorie Hopkins, his former wife, concerning confidential matters occurring during their coveture under the provisions of Title 14, Section 307 of the District of Columbia Code, 1940 Edition, and was the interpretation of that Statute and the application of the facts to the instant case as given by the Court of Appeals sound (R. p. 280)?

Title 14, Section 307 of the District of Columbia Code, 1940 Edition, reads as follows:

> "Title 14, Section 307—Confidential Communications Between Husband and Wife, District of Columbia Code, 1940—In neither civil nor criminal proceedings shall a husband or his wife be competent to testify as to any confidential communications made by one to the other during the marriage."

4. Did not the Court below commit prejudicial error in failing to instruct the jury fully as to the law involved in the instant case and was not this error perpetuated by the decision of the Court of Appeals with respect thereto (R. pp. 256-273)?

(a) Was not it error for the Court to refuse the Prayers offered by the defendant covering the essentials with respect to embezzlement, and indicating that where no time was fixed for the delivery of property no demand is necessary?

(1-a) Was it not incumbent upon the Court to affirmatively instruct the jury as to the necessity for demand to have been made where, as here, the defendant came voluntarily into the possession of the funds and there was no time fixed for the return of the funds, and where the testimony was disclosed that the defendant at all times had set aside and ear-marked the money thus entrusted to him, and that he was a one-seventh participant in an estate of approximately $42,500.00?

(2-a) Under the circumstances thus outlined in (1-a), does it not become all the more apparent that error was committed by the Court in allowing testimony as to the financial condition of the defendant prior to and after the time of the indictment?

(b) Was it not error for the Court to refuse the defendant's Prayer to the effect that it was necessary for the Government to maintain itself in all material matters of the indictment and that where the testimony was all one way in favor of the defendant and was not immaterial, irrelevant, improbable, inconsistent, contradictory or discredited, that such testimony or its insufficiency cannot be disregarded or ignored, and that the verdict shou'd be "Not Guilty."

(c) Was it not error for the Court to grant to the Government a Prayer referring to the defendant as the attorney for Grace L. Jones, Committee, on the theory of the alleged embezzlement, with the inference that in that capacity he came into possession of the funds involved, when the testimony was uncontradicted that the said Grace L. Jones voluntarily turned the money over to the defendant as custodian for safekeeping?

(d) Was not the charge of the Court with regard to fugitivity either definitely a misstatement of the law or so confusing as to the application of the phraseology used as to result in an interpretation derogatory and prejudicial to the defendant (R. pp. 267-268)?

5. Did not the Court commit error in not withdrawing a juror when one of the jurors addressed a communication to the Court asking instructions upon a certain phase of the testimony while the defendant was testifying, before the case was closed, which said communication indicated that the said juror had arrived at a conclusion prejudicial to the defendant?

Was this error corrected when the Court, having apparently appreciated the wrong committed, indicated that the matter would be taken care of in the charge, and then failed to make any corrective suggestions?

Was the Opinion of the Court of Appeals sound in excusing an error made by the Court, predicated upon the acquiesence of counsel upon a promise of the Court to clear up same, which was never done?

The defendant is a member of the Bar of the District Court of the United States for the District of Columbia, the United States Court of Appeals for the District of Columbia, and the Supreme Court of the United States. Would not the allowing of this judgment to stand upon the entire record amount to the taking of property without due process of law?

D.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals for the District of Columbia has given improper construction and effect to the following Sections under Title 22: 1202, 1301 and 2203 (Statute having to do with false pretenses, larceny after trust, and embezzlement), and Section 307 under Title 14 of the Code for the District of Columbia, 1940 Edition (statute having to do with confidential communications between husband and wife).

2. The Circuit Court of Appeals for the District of Columbia failed to follow the law and precedents established both in other jurisdictions and by its own pronouncements in former decisions, rendering the law in the instant case as disturbing and unsettled.

3. The Circuit Court of Appeals for the District of Columbia erred in failing to correct an apparent error recognized by the lower court with a suggestion that same was to be corrected, and upon that theory, acquiesced in by

counsel, the same being not corrected and nevertheless allowed to stand, contrary to the law of the land as enunciated by this Court. See the case of Chester G. Bollenbach v. United States, decided January 28, 1946.

4. The Circuit Court of Appeals for the District of Columbia, in affirming the judgment of the lower court in the instant case, allowed of and laid the unquestioned foundation, by reason of unjustified conviction, of the taking of the property right of the defendant without due process of the law (the license to practice law in the District Court of the United States for the District of Columbia, the United States Court of Appeals, and the Supreme Court of the United States all hinge upon allowing this conviction to stand).

In support of the foregoing grounds of application your petitioner submits herewith the accompanying brief setting forth in detail the precise facts and arguments applicable thereto. Petitioner further states that this application is filed in good faith and not for purposes of delay.

CONCLUSION.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the District of Columbia should be granted.

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By JAMES A. COBB,
GEORGE E. C. HAYES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. ———

NATHAN A. DOBBINS, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

OPINIONS OF COURTS BELOW.

The judgment of the District Court of the United States for the District of Columbia appears in the Record, p. 282.

The Opinion of the United States Court of Appeals for the District of Columbia, rendered June 28, 1946, is not yet officially reported but is printed and appears in the Record on page 276-281.

ARGUMENT.

Doubtless the most intelligible approach to the issues here involved will be to take up the errors hereinbefore referred to and couple same with the Opinion as handed down by the United States Court of Appeals, analyzing said Opinion as it appears to the petitioner to have adversely affected his interest.

Reference had to the Opinion handed down by Mr. Justice Clark will reveal that same begins by a statement as to what appears from the record from a factual point of view. A careful perusal of the record will disclose the ineptitudes of the statement of the Court in that the excerpts set forth do not give the full or correct picture.

The Court in its Opinion said: "It appears from the record that appellant came into possession of funds alleged to have been wrongfully converted while serving as attorney for Mrs. Grace L. Jones, substitute committee of the estate of her father, an adjudged lunatic." It would seem from this statement that the money turned over by Mrs. Jones to the petitioner was turned over to him as her attorney, whereas in truth and in fact, it was turned over to him simply in the capacity of a custodian, to be returned to her when so desired, and by so much, at the very outset the Court seems to beg the question on one of the elements most important from the petitioner's point of view. It is to be remembered, as indicated, that conviction in this case was on the statutory offense of embezzlement, and therefore, the question of the relationship as existing between the parties is one of paramount importance. The question as to whether one is called upon to account for moneys without demand, as has been held by the Court in this case, would of necessity depend upon the manner in which the party involved came into possession of the funds, and it cannot be carelessly shunted aside that in this instance the money was in the hands of the petitioner with no call upon him to make an accounting until such time as the person who had turned the funds over to him made demand therefor. The Court further, in its opinion, stated: "Appellant gave Mrs. Jones reason to believe that the proceeds of these checks, less a small monthly cash allowance paid to her for use in behalf of her father, were being deposited in the Industrial Bank in her name as committee . . ."

The fact is that the evidence does not disclose any such thing, except the statement under oath, filed by Mrs. Jones, stating that the moneys were deposited in the Industrial

Bank. It is true that petitioner had an account in the Industrial Bank at the time he was receiving these moneys and that the deposit was a running account, but the fact is that Mrs. Jones testified petitioner never told her he was putting the money in any bank. She assumed that the money was being placed in the Second National Bank because her mother kept her account there when she was Committee of the estate. We quote from Mrs. Jones' testimony, Joint App. p. 31:

> "The Court: What did you say he said about that, that he was going to do with it when you turned it over to him?
> "The Witness: He said he was going to deposit it in my name as committee of the estate.
> "The Court: Where?
> "The Witness: Well, he didn't say—he didn't name the bank, but I presumed it was the Second National Bank, because there is where my mother's account was at the time of her death. That is where the account was.
> "The Court: He didn't actually say he was putting it in the Second National?
> "The Witness: No."

Be that as it may, if petitioner was simply the custodian of this fund, and we respectfully submit that the record shows that beyond peradventure, it was of no moment in what bank he kept the funds or whether he kept them in any bank if he did not convert the same to his own use. No more is it important as to whether or not, as is apparently emphasized by the Court, the individual checks which he received were cashed in liquor stores or restaurants or were deposited to his personal account so long as there was no actual conversion of the funds, and too, if there was any offense for misleading Mrs. Jones as to where he kept the funds, it was one of false pretenses and not embezzlement, and that was one of the reasons why we asked the Government to elect upon what counts it would go to trial in order that the defense might be put forward in a truthful and intelligent way. It is also important in this connection to

note that at the end of the Government's case the counts of false pretense were taken from the Jury on the ground there was no evidence to support same.

The next expression made by the Court, in its Opinion, was:

> "The prosecution introduced two annual reports, prepared in appellant's office, signed by Mrs. Jones and filed with the Auditor for the District Court. Each of these reports falsely stated that substantial funds were on deposit in the Industrial Bank in Mrs. Jones name as committee. It was shown that in fact the bank had never had an account so designated. Testimony by appellant's secretary showed that the basic information on the first report filed with the Auditor was furnished by appellant."

If the correctness of this statement be conceded we pose the question—how is this supportive of the conviction for embezzlement? Certain it is that the account was Mrs. Jones' and not the petitioner's, and we submit in fairness that this statement could not or should not have been considered by the Court with emphasis without having taken into consideration the fact, undisputed as brought out by the testimony, that the account reflected amounts which Mrs. Jones' unquestionably knew were not and could not have been on deposit in the Industrial Bank or anywhere else because she herself had used these amounts, as the evidence disclosed.

If there were, as apparently there was, this understanding between the person to whom the money in the final analysis belonged and the person to whom she had turned it over as custodian, can it be said that embezzlement was engaged in when as between these two parties no demand was made, one of the other? It is respectfully submitted that there is no importance as to where the money was kept. The only question is as to whether or not there was any conversion, and this case shows to a demonstration that there was none. We venture a quotation from the case of Ambrose v. United

States, 45 App. D. C., 118, in which Mr. Justice Robb uses the following expression:

> "While, of course, it is the better way for the guardian to keep money of his ward entirely separate from his own, the mere fact that he does not do so affords no sufficient basis for a presumption of evil intent."

In the Ambrose case the relationship existed of guardian and ward, with a legal requirement of an accounting being made annually. In the instant case there was a relationship of gratutious custodian, with no legal requirement of accounting and no necessity of turnover unless demand were made.

The Court further states that the petitioner during that period was in poor financial condition and—" . . . that he departed from Washington in November of 1944 for an extended period under circumstances suggesting that he may have known that the Auditor's Office would be examining the Jones account."

With respect to the first part of this statement we respectfully submit that the evidence does not bear out the statement made by the Court that the petitioner was "in poor financial condition" and if he were, embezzlement would nonetheless not be sustained simply by such a statement. However poor his financial condition may have been, can it be said that he was not able to and did not have funds with which to pay back any moneys borrowed? Is it fair, from the fact that a person borrows, and pays back, money, to draw the inference that by so doing he has embezzled funds left with him? Is the suggestion thus made that what he should have done was to have used the money which had been entrusted to him, or is it rather a fair inference that unless it can be shown to the contrary that weight must be given to the testimony of the petitioner to the effect that these funds, because of the manner in which they had come into his possession, be kept separate and apart, biding the time request was made of him? And also would it not be fair in this connection to show that he did have funds de-

posited through James A. Cobb, in the Munsey Trust Company at that time and that he was the owner of a one-seventh interest in an estate of $42,500, and that when it became necessary for him to raise $5,000 for a cash bond it was done immediately his sister having testified, as is disclosed by her testimony and the records that they walked right into the Building Association and the money was handed over to her even without a note? It is a far-fetched cry to convict a person, a citizen of good standing, on the flimsy evidence had that is quoted in the above testimony. Equally unfair, it would seem to us, is the inference to be had from the quoted part of the Court's Opinion " . . . that he departed from Washington in November of 1944 for an extended period under circumstances suggesting that he may have known that the Auditor's Office would be examining the Jones account."

First of all, of what importance is it that the Jones' account was to be examined? And certain it is that there is no evidence tending to support the statement that he departed from Washington in November 1944 for an *extended period.* If the suggestion be that this was a flight because of any guilty knowledge, is it intelligent to suppose that this man, a practicing attorney for a long period of years, would have gone to the home of his parents with the idea of any hiding from any situation which he faced? Would it not be fair to make some comment under the circumstances on the fact that the testimony was that he left his office with his rent paid, with a clerk in charge, and went to the home of his parents, intending to, and would have returned to the city after a reasonable visit with his parents except for the fact that he was taken ill while at his parents home, all of which is undisputed in the testimony? And on the first intimation he had that there was anything wrong he immediately got in touch with reputable counsel, Mr. John F. Wilson, whose office is half a block from the Court House and practically the same distance from the trial court, who assured him everything was all right and that he would be kept advised, and, as disclosed by the testimony without a

scintilla of evidence to the contrary, that as soon as he heard of the indictment he made ready to return to the District of Columbia, together with his wife and children, to their home here in the District of Columbia?

Certain it is that the Court of Appeals is not, by this suggestion, supporting what we believe to be one of the gravest errors in this cause, and that is to indicate that a departure from the city in and of itself is an evidence of guilt.

Suggesting a following of trial chronology, the Court says:

> "Appellant first urges that the trial court should have directed a verdict for the defendant at the close of Government's opening statement. This argument is based on the prosecutor's failure to state that the Government would prove a '*wrongful* conversion' or '*fraudulent* taking.' We observe that this argument does not go to the sufficiency of the indictment. It is addressed only to the opening remarks of the prosecutor. We have not been referred to any authority, nor have we found any, which holds that the prosecution's opening remarks must be in the precise language of the indictment. Here, the indictment was admittedly good, and the opening statement on behalf of the Government set out in considerable detail the nature of the evidence upon which the prosecution would rely. The omission referred to did not prejudice the defendant in making his defense or entitle him to a directed verdict at that point."

Frankly we are a bit unable to follow the reasoning of the Court in this connection. This was not an attack upon the sufficiency of the indictment. This was rather an attempted requirement of what we believe to have always been the rule and custom, both in civil and criminal practice. That, if in the statement of what one intends to prove made in an opening statement, it is apparent that if all that were proven, it would still not make out a case or offense, that a Court would direct a verdict if there were a lack of sufficiency in the opening statement, or by allowing the person making the opening statement to supplement his re-

marks to bring the opening statement within the purview of a good cause of action or a valid basis of conviction. First of all, with this privilege of amendment granted, the prosecutor saw fit not to supplement his remarks. In the light of the developments, the reason for this is apparent. The prosecutor, in his own candor, knowing the extent of the possibilities of his proof, did not feel disposed to and did not pretend that he could prove a "*wrongful* conversion or a *fraudulent* taking." Even though the indictment was good with the allegations of the charge, the opening statement was bad, we respectfully submit, by reason of its failure of inclusion of elements essential to the crime alleged to have been committed.

Let us state it in another way: what is the purpose of an opening statement, either in a civil or criminal case? The answer is—to disclose to the other side what the prosecutor intends to prove, and, as before stated, it must have all the elements necessary to make up the offense charged. The Court states that counsel furnished no cases in support to hold that the opening remarks be in the language of the indictment. Counsel took no such position then and takes no such position now. An indictment may or may not be in the precise language of the opening statement. See Cruikshank v. United States, 92 U. S. P. 542, 23 L. Ed. 588. If the Court meant to say we furnished no cases in support of our contention that the case should have been taken from the jury because in the opening remarks of the prosecutor there was not a sufficiency to make out a case of either false pretenses, embezzlement or larceny after trust, our answer to that is under our practice in the District of Columbia it has never been necessary to take any case to the Court of Appeals when a motion is made to take the case from the jury on account of an insufficiency of an opening statement. The trial Justice examines the question, and if he comes to the conclusion there is not a sufficiency in the opening statement, an opportunity is had to supplement, and if no addition is made, the case is usually taken away from the jury. The Court of Appeals of the District of Co-

lumbia and this Court have held that it is not only proper, but that it is the duty of a trial court to take a cause from the jury in the event that the opening statement shows a legal insufficiency, or that if all the facts as set forth concededly were proven, that there would nonetheless not be a maintainable cause of action. See Young v. Howard, 73 App. D. C. 340, 120 Fed. (2) 712.

It is respectfully submitted that the petitioner was entitled to a directed verdict immediately that it became apparent to the Court from the opening statement that the proof, if it were to sustain what the prosecutor said in his opening statement, would still not measure up to the requirements in the language of the indictment.

We do not need to go beyond this Opinion itself to demonstrate the correctness of this position because further along in the Opinion the Court sets forth—"A mere conversion will not suffice. . . . the core of the crime . . . is the proof of the accused's '*wrongful*' intention." If this be an essential and if there were a failure to set forth same in the opening statement, the same being called to the attention of the Court and of the prosecutor, can it properly be said that the petitioner was not entitled then to a directed verdict or that the prosecutor should be required to supplement his statement with this essential language if he were not unmindful of the fact his proof would not sustain it?

Again the Court stated:

> "Likewise, we do not think the trial court erred in refusing the defendant's motion that the Government be required to elect to place its case on one of the three crimes charged before putting in evidence. This is a matter within the discretion of the trial court and its ruling was not an abuse of that power."

We admit that ordinarily such is within the discretion of the trial court, but we respectfully submit that if this was not an abuse of the discretion of the court, it is difficult to imagine wherein there would be an abuse. The indictment consisted of 69 counts; 23 of false pretenses, 23 of larceny

after trust, and 23 of embezzlement. The Government knew the evidence it had to place before the jury, and knew whether the evidence would channel the case in the category of false pretenses or embezzlement or larceny after trust. The defense did not know because it was confused for the reason that if the evidence produced by the Government measured up to the opening statement, it would not make out a case in either category. An instructed verdict had already been asked for on the ground of a lack of a sufficient statement, if proven, to make out an offense under the Statute of either embezzlement, larceny after trust, or false pretenses, which was, in our opinion, improperly overruled.

It is difficult to imagine a situation where there would be a greater confusion than in this case—an indictment containing 69 counts, channelled in three categories, and an opening statement by the prosecuting attorney as to what he expected to prove, and if proven, which would not make out an offense in either category of the indictment. In this connection we quote in part from the case of Kidwell v. United States, 38 App. D. C. 570, in which the Court there held—

> " . . . There are often circumstances which would render a uniting of several offenses unjust to a defendant, and, as the old cases put it, 'confound him in the making of his defense.' Whenever such a situation arises, the trial court will protect the defendant's right to a fair trial. . . .
> "While consolidation for trial under this statute is within the discretion of the trial court, where there is an abuse of that discretion in a criminal case an appellate court will not hesitate to correct it."

Again we say that this certainly was an instance in which there was an abuse of discretion.

In its Opinion the Court of Appeals says:

> "Appellant urges vigorously that 'the most flagrant error in this case' was the trial court's failure to rule

that, where funds are voluntarily turned over to the accused, a demand for their return is necessary to support a prosecution for the crime of embezzlement. *In the circumstances of this case neither the authorities nor sound reason are on the appellant's side of this point.*" (Underscore ours)

It is difficult to understand the language used in this part of the statement underscored by us. Let us examine the authorities and the sound reasoning of the Court. We maintained and urged then and now that in a case of this kind a demand was necessary. The facts disclosed that the petitioner came into these funds at the instance of Mrs. Jones as a voluntary custodian. He himself testified, and there was no statement to the contrary, that he first did not want to take possession of the funds and hold them for her. The record shows without contradiction that the first money of $285 was turned over to an assistant in petitioner's office while he was absent from the city. The only apparent disagreement with this statement was that Mrs. Jones stated she thought she turned it over to him, but was not sure. Petitioner, his assistant Wainwright, and his secretary all testified that the check was turned over to Wainwright in the absence of petitioner. Subsequently thereto, the checks were turned over to him as custodian for safe keeping, some of the checks being cashed and used by the committee, Mrs. Jones, and at no time during this whole course of procedure was any request or demand made to the petitioner to give back any part of this money to Mrs. Jones. She never requested any money from petitioner. On January 16, 1944, the said lunatic, William Butler, died. One check for $71.47 came to Mrs. Jones thereafter, which she returned to the Government. In February 1944 the petitioner filed an application to have Grace L. Jones appointed as administratrix of the estate of her father, William Butler, in order that she might be in position to receive the money. The application was not consummated, the reasons given by petitioner were that he was in litigation and having family troubles and the bonding company would not go on Mrs.

Jones' bond while petitioner was acting as her attorney. Subsequently and on April 6, 1945, Grace L. Jones was appointed as administratrix, and was then paid in full the $1300 which petitioner had been keeping as a custodian, and not only did he pay the $1300, but the Auditor's fee, which he was not compelled to pay, of $200 was paid by him. So in the light of this, how can the Court make the observation that—"neither the authorities nor sound reason are on the appellant's side of this point."

As before stated, petitioner was holding the money as a custodian and the uncontradicted testimony was that he was in possession of the funds all the time and that when request was made there was not the slightest delay and the money paid over to her.

Now let us look at the authorities in support of the proposition now urged by us. In the case of People v. State of California, 116 Cal. 386, 48 Pac. 326, quoted with approval in the case of Ambrose v. United States, supra, we find the following:

> " . . . The Court, in commenting upon the fact that the defendant had withdrawn from the bank most of the money which was on deposit there to the credit of the ward, said: 'But this was not a criminal act, and did not show a criminal intent to misappropriate the money. He may have intended to deposit the money in some other bank, or to invest it in safe securities. * * * So far as appears, the defendant at the time of the trial may have still had all the money ready to be paid over on demand to any one authorized to receive it.' The court ruled that the evidence did not justify the verdict, and therefore reversed the judgment."

In the case of State v. Reynolds, 65 N. J. L., 424, 47 Atl. 644, likewise cited with approval in the Ambrose case, supra, it was ruled that in all cases—

> " * * * which are of an uncertain, or general, or special agency, where the time for the return of the funds collected is indefinite, or not fixed, or which is at the pleasure of the agent or servant, *there a demand or*

> *other evidence of a fraudulent intent to convert may be necessary to put the defendant in a position of having fraudulently converted the money to his own use.* It should be said, however, that a demand and refusal does not of itself in any case establish conversion, or conversion by a defendant to his own use, but that it is only evidence to go to the jury upon the question of the defendant's fraudulent conversion." (Underscore ours)

Mindful of the fact that the Court takes the position that neither the authorities nor sound reason are on the petitioner's side, the pertinent language of the Court of Appeals is of necessity of great value. It is further to be noted that the authorities cited by the Court include in their applicability to a Federal jurisdiction the cases of Fullerton v. Government of the Canal Zone, 8 F. 2d 968, 972, and Hancey v. United States, 108 F. 2d 835. These cases also show to a demonstration the validity of the position taken by the petitioner. In the Fullerton case we quote from the syllabus—

> "Offense of embezzlement by officer of fines collected by him, which he is under duty to account for and pay over to another officer, is complete without any demand for and refusal to make such payment."

The distinction is immediately apparent. In this instance there was a requirement of payment which was a part of the legal duty of the officer who collected the fines and the embezzlement came in his failure to make those payments. Of course, in such an instance no demand was necessary. How far afield, however, is this from the present case where the petitioner was a custodian of the funds, but no legal demand for the making of payment nor any legal requirement of making payment at any time, the embezzlement then being only maintainable after time of demand, as contended for by petitioner. In the Hancey case (inadvertently in the Opinion spelled Haucey), a citation from the syllabus will likewise show its inapplicability to the circumstances in the instant case. We quote:

"4. Criminal Law Sec. 409—Evidence that assistant cashier of bank issued a cashier's check for installment payment of his automobile, that the check was paid out of bank's funds upon presentation, that there was a shortage in cashier's check account, and that amount had not been paid, established 'embezzlement' and the corpus delicti,' so that testimony by cashier and bank examiners concerning admission of accused was admissible."

Here again, the very act of the issuance of the cashier's check for the installment payment on his automobile, with a shortage in his own account, was in and of itself an act of conversion, the wrongfulness of which was apparent, but which again demonstrates its lack of parallel to the instant case.

This Court says: "Repayment will not, of course, serve to clear the defendant. Henry v. United States, 50 App. D. C. 366; 273 Fed. 303; State v. Baxter, (Ohio), 104 N. E. 311."

We admit, of course, where there is a conversion, repayment is not the answer to embezzlement, but we do strenuously contend that we do not get to the question of repayment until the question of payment is raised, either by demand or other circumstances that amount to same. The Henry case is a poor citation in support of the Court's contention that a repayment does not serve to offset embezzlement. Henry was a member of the investment banking firm of L. Johnson Company, which had failed, owing to its depositors thousands and thousands of dollars. Not a dime was paid back, and in this case Henry took the securities of one of the investors in the firm and sold them and never accounted for the proceeds thereof, the language of the Court being, in stating the facts—". . . Shortly afterward Henry hypothecated them (referring to the securities) for his use securities of the firm and never accounted to the owners for the certificates or proceeds." That case was tried twice before the court, the first being reversed by the Court of Appeals for the District of Columbia (49 App. D. C.) and the second time affirmed with a strong dissenting

opinion by Mr. Justice Robb, and as before stated, thousands and thousands of dollars were lost.

All that the Henry case purports to say, which was by way of obiter in that there was no repayment or attempted repayment, and with which we have no quarrel, is that if there were an embezzlement that paying of the money back does not wipe out the offense. In the Henry case the language tends to show in marked distinction from the instant case, that Henry not only did not pay the money back, but that—"there was no showing of his intention so to do even were he to have obtained money which the evidence showed he was attempting to borrow."

The Court of Appeals for the District of Columbia takes the position that the necessary *wrongful* intention to constitute the crime of embezzlement may be proven directly or by inference from circumstances disclosed by the evidence, or by the conversion itself, and in support of this position gives the quotation from the decision in Masters v. United States, 42 App. D. C. 350. That this is the law there could be no question, but what again as to the applicability to the present case? Certain it is that there can be no pretense that there was any direct proof of any wrongful intent on the part of the petitioner. To the contrary, the evidence tended to show that as soon as Mrs. Jones qualified as administratrix of her father's estate, this being the first instance in which she could rightfully take after the time of her father's death, the money was turned over to her by the petitioner or those acting in his interest. To say that the intent was shown by the circumstances of the case as disclosed by the evidence would be simply to beg the question for we respectfully urge that there was no circumstance in this case which could properly be taken as an expression of a wrongful intent on the part of the petitioner. Again, to say that the wrongful intent could be inferred from the alleged conversion gives no answer because the fundamental question in the instant case is, was there ever a conversion—to which we say, the answer is unqualifiedly no, and which,

from the Government's point of view, is without supportive evidence.

In answer to the suggestions of the Masters case we invoke all that has heretofore been said on the question, including the Masters case itself. Let us supply the language in the Masters case immediately preceding that used by the Court, which is as follows:

> "To eliminate from the 'wrongful conversion' the element of criminal intent would mean to reduce the offense to a mere tort. Before there can be a conversion of the property of another, there must be an intent on the part of the doer of the act to convert the property to his own use without the consent of the owner. State v. Silva, 130 Mo. 440, 463, 32 S. W. 1007. But a wrongful conversion implies a conversion by the doer of the act without color of right, and with the evil intent of converting the property to his own use. The intent to wrongfully convert the property of another implies more than the intent to merely convert. It implies a mind at fault, an evil mind capable of intentionally committing the offense here defined by the statute. * * * It was error, therefore, for the court to refuse to permit counsel for defendants to argue the question of criminal intent to the jury, and thereby withdraw from the consideration of the jury the evidence offered to establish the good reputation of defendants for honesty and integrity."

The Court, in its Opinion, states that there was no error in allowing Marjorie Hopkins, wife of the petitioner, to testify as to certain transactions that took place between the two when they were married, and purports to justify the allowed testimony of the wife on the ground either that the testimony had to do with transactions before they were married, or transactions or prospective transactions which, by their nature, required communication to third persons, and takes the position that nothing in the record disclosed that the testimony of the wife had to do with things "confidential" in character. This is an apparent attempt to justify the allowance of the testimony under the language of the Statute, which we here set forth:

"Title 14, Section 307—Confidential Communications Between Husband and Wife, District of Columbia Code, 1940—In neither civil nor criminal proceedings shall a husband or his wife be competent to testify as to any confidential communications made by one to the other during the marriage."

Without any instruction from the Court as to any limitation on her testimony to matters not confidential, petitioner's wife Marjorie Hopkins was allowed to and did testify in part as follows (R. pp. 227-231):

"By Mr. Jenkins:

Q. During the period that you were the wife of Mr. Dobbins, did you ever have any conversation with him concerning his need for money? A. Yes, I did, on numerous occasions.

Q. About his need for money? A. On several occasions—

Q. Will you answer the question? A. You will have to state it again.

Q. Between 1942, when you became married to him, and November 1943— A. On several occasions he came to me and stated that he was in need of money. I was not in a position to loan it to him, but he knew my family had some money. He asked me if I would go to them and ask them to loan him this money. On one occasion he needed $600. We talked it over and the two of us went to my mother. He told her he would have to have it, that he was being pushed for some funds. So she let him have $600. That was in August 1942. He signed promissory notes for it.

Then on another occasion he wanted $200, and I borrowed that from my grandmother. Personally, I loaned him close to $300.

Then on another occasion I went to a loan company with him and borrowed $600 for him.

Q. That was during this period you speak of? A. Yes.

Q. I show you here a note and ask you what that is? A. That is a note he made payable to my mother for $600 that I asked her to loan him. We asked her together, but she loaned it to us on my account.

Q. That note is dated August 11, 1942. I show you check on Industrial Bank of Washington. Can you identify that check? A. Yes, that is my check.

Q. It is to Nathan Dobbins; is that correct? A. Yes.

Q. And another check dated the 24th of December—

Q. Another check dated June 28, 1943. A. That is right.

Q. To Nathan Dobbins? A. Yes.

Q. Can you identify that check? A. Yes.

Q. This note which has been marked and which you have identified as Government Whiting No. 4, in the amount of $600, do you know whether or not that note has been paid? A. All the payments are marked right on here, the payments that were made.

Mr. Hayes: I respectfully submit that is not proper. Mrs. Whiting is not the maker of that note. The question whether or not it has been paid is nothing but hearsay.

By Mr. Jenkins:

Q. It is my understanding that your reply was that certain payments were made to you which you made to your mother; is that correct? A. We live in the same house, my mother and I, and when the payment was given to me—'Here is so much money, give it to your mother.' We were all three as one family. There was not any separate residence or separate apartment. The whole transaction was known to everybody in the house.

Q. And the entries on here indicate the dates of the payments you speak about; is that correct? A. Some are in my handwriting and some are my mother's. This (indicating) is my handwriting here.

Q. Will you indicate the amounts where your writing appears and the date the payment was made? A. The first payment is his writing. The second is mine. The Third is mine. The others are my mother's. This (indicating) is his handwriting here.

Q. Were you present at the time any of these payments were made? A. When all of these payments were made I was there.

Mr. Jenkins: I would like to indicate to the jury the dates.

Mr. Hayes: I submit it has no probative force and is inadmissible.

The Court: They may be received over objection.

Mr. Jenkins: The payment indicates the following: November 15, 1942, $50; December 8, 1942, $50; January 18, 1943, $20; March 1943, $22; March 28, 1943, $22.

Q. I show you this check was marked Government Whiting No. 2 and ask you about that check. A. Well, this check was given him during the time he was involved in some litigation, and he had to have a witness, a hand-writing expert, he told me, to testify in his defense. He was on his way to Mr. Hayes' house and he had to carry $50 with him and he did not have it and he asked me if I would loan it to him and I gave him this check. That was a gift.

Q. How much is that check? A. $50.

Mr. Jenkins: I offer these in evidence.

The Court: They will be received over objection and exception noted.

Q. Mrs. Whiting, during the time you were married to Mr. Dobbins, were you familiar with his quarters, his office quarters? A. Well, I was there two or three times a week. I used to meet him for dinner when he finished in the evening.

Q. During that period of time did you know whether or not he had any strong box in his office? A. I wouldn't know that."

It is respectfully submitted that this testimony is "confidential" in character and is the very sort of thing against which the Statute is directed. Mrs. Hopkins was, as the testimony shows, a hostile and a biased witness, and the protection afforded the petitioner as her husband was violated by allowing her to testify to these transactions which she gained knowledge of only by reason of the intimacy of husband and wife. This Statute is not permissive, but prohibitive, and the very purpose of the Statute is to render impossible the testimony of one spouse against the other as to knowledge which has been gained through maritial relations, when one of the spouses is willing to testify hurtfully against the other. This Statute was passed not only for the protection of the husband or wife, but passed in the interest of the public in order that there

might be a full disclosure between husband and wife without looking to the future that anything transpiring during the marital relationship might be used against either.

It is of more than passing significance that even though, as the testimony disclosed, some of these alleged transactions were with the mother of the wife, that no questions were asked of the mother who testified in this cause, the only question being had to her being on the question of the cashing of one of the checks made the basis of the indictment.

We respectfully submit this is erroneous and a strange interpretation of the Statute. In the Book of Holy Writ, the crystalized language of men of great wisdom and experience, we find:

"... in the days the Judges ruled that there was a famine in the Land." Ruth, 1.1.

It would seem that our forefathers considered this prophetic when they adopted the Constitution of the United States, with its three departments of Government—legislative, executive and judicial, each one with its separate and distinct functions.

In answer to the statement made by the Court that—

> "Appellant further contends that the trial court erred in admitting evidence which reflected on the defendant's financial condition prior to and after the time of the indictment. The argument is without merit. The testimony complained of was reasonably related to the dates charged in the indictment."

We contended in our Brief, and we reiterate, that transactions a long time prior to the date of the alleged happenings set out in the indictment and subsequent to the indictment had no place in or relation to this case. In fact we stated that the record does not disclose that the petitioner was in a desperate situation for money. It only disclosed he borrowed money from time to time, but with every penny paid back. It is very significant that a person would pay back money where there is no impelling force except civil,

and that he would take money with the intent to convert it to his own use in derogation of the Statute, and make himself liable to a criminal offense.

Further in this connection we urge that the testimony concerning this situation was utterly improper, typical of which is that one Nolan, who testified he repossessed petitioner's car, when in truth and fact it was disclosed on cross-examination the car was turned over to him after the indictment had been had and petitioner returned to the city without the slightest importunities or litigation. The Court cites the Ambrose case, supra, in support of its position. We respectfully submit the Ambrose case reverses the lower court on positions less tenable than those taken in this case.

The Court, in its Opinion, says—

> "The objections raised by appellant concerning the instructions which the trial court gave and refused to give, are not convincing."

This is strange language coming from the Court in view of the fact that the Prayers granted or denied, made the basis of objection, are not set forth. It is our opinion that decisions and written opinions, handed down by this Court, are in the nature of guide-posts not only in this case, but as a matter of the full complement of the law in this jurisdiction, and the opinions are required by Statute to be written apparently for this very purpose. It would seem under these circumstances that at least the Prayers would be set forth in order that the basis for the comment of the Court might be apparent and that the law as thus laid down might be intelligent. Let us in this vein set forth one of the Prayers granted and one denied, which were made the basis of objection and brought to the attention of the Appellate Tribunal:

> "Prayer No. 1 (granted the Government): The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant was the attorney of Grace L. Jones, as committee of the estate

of William Butler, and that there came into his possession or under his care, by virtue of his employment, money belonging to the said Grace L. Jones, as committee of the estate of William Butler, and that he did then and there wrongfully convert said money to his own use you should find him guilty of embezzlement."

Take this Prayer for instance; it is stated that if the jury believed beyond a reasonable doubt that the defendant was the attorney of Grace L. Jones, as committee of the William Butler estate, and there came into his possession for care by virtue of his employment money belonging to the said Grace L. Jones, and that he wrongfully converted the same to his own use, there should be a conviction. The evidence in this case was uncontradicted; that the money did not come into the petitioner's possession by virtue of the fact he was attorney for Grace L. Jones as committee, but on the contrary that the money came direct and made out to Grace L. Jones from the Government and that she voluntarily turned the money over to petitioner for safe keeping. We respectfully submit that this Prayer assumes a condition existing and evidence produced on the part of the Government, neither of which was there, and it was great error to give this Prayer to the Jury.

A Prayer offered on behalf of the defendant and which was disallowed was as follows:

"Embezzlement is the fraudulent conversion of property by the person to whom it has been entrusted, and to constitute the crime, there must be a conversion either actual or constructive, so that where no time is fixed for the delivery of property, a demand is necessary to determine a lawful possession."

That is the exact language used in the case of State v. Ensley, 177 Ind. 483, 97 N. E. 113, which case had been quoted with approval in the Ambrose case, supra, and other cases in this jurisdiction. The Prayer goes on to say—

"The Jury is instructed that where the testimony on any material and vital allegation necessary for the Government to maintain itself under this indictment is insufficient or is all one way in favor of defendant and is not immaterial, irrelevant, improbable, inconsistent, contradictory or discredited, such testimony, or its insufficiency, cannot be disregarded or ignored, and the verdict should be 'Not Guilty.' "

Why was this not a proper Prayer if the evidence supported it, and we respectfully submit that it did? Let us look at the facts as disclosed in this case, and uncontradicted, upon which this Prayer was predicated. Petitioner testified that this money was voluntarily turned over to him; that testimony was corroborated by Mrs. Jones, who said she sometimes turned it over to him, his clerk or his assistant in the office; that at no time had she made demand on him for the money nor did she make any complaint against the petitioner Dobbins. She further testified she did not know how the matter got into the courts or before the Auditor. Petitioner testified that he at all times had this money in his possession to return to Mrs. Jones when demanded of him and in a position to receive it. That was accordingly done upon her qualifying as administratrix of her father's estate. Further petitioner testified, and the record disclosed, that at one time during the time he had this money in his possession he turned over to James A. Cobb $2,000, to hold for him, the reason being he was having litigation and he did not want this money to be jeopardized. The record of the Munsey Trust Company, including the book and checks, proved what he said. He further testified, which was corroborated by his sister, Zara Hamilton, that the money, when returned to him by James A. Cobb who was going out of the city for some considerable time on account of his health, was turned over to her. She stated she at all times kept that money intact in her safe in Charleston, South Carolina. It was testified and disclosed that she had a safe; that she had other money there and when it became necessary to pay this money over it was paid to Mrs. Jones. Further it was

shown, and not denied, that during all this time that the petitioner Dobbins had a one-seventh interest in an estate in Charleston, South Carolina, left to him by his father, amounting to $42,500. That was not denied. On the contrary, it was shown by the Government that after a loan was made to Mrs. Hamilton to put up a cash bond of $5,000 that a loan was made on this property, including petitioner's interest, to reimburse her for the money she had put up.

In the light of all this, without a scintilla of evidence to the contrary, and in view of what the Court of Appeals has said in the case of Stone v. United States, 136 Fed. 2d 761, 78 U. S. App. D. C. 5, and other cases, how can it be said by the Court that—"The objections raised by appellant concerning the instructions which the trial court gave and refused to give, are not convincing."

The error as to receipt and rejection of other prayers is equally demonstrable, however, they are set out in the record and the point here made will be evidenced by their perusal.

We turn now to the suggestion that the instructions of the Justice of the District Court of the United States are without error, and particularly with regard to so much thereof as had to do with the question of the alleged flight of the petitioner. First of all, in this connection the Court allowed a Government Prayer which was incorporated as part of the Court's instructions, which reads as follows:

> "The Jury are instructed that flight from justice or concealment is admissible as evidence of consciousness of guilt. Accordingly, if the jury finds from the evidence that the defendant fled from the jurisdiction to avoid arrest or concealed himself to escape from charges growing out of his acts in this case you may consider this along with other evidence in the case with respect to the alleged guilt of the defendant."

That as an abstract proposition of law may be correct, but it was urged at the trial, and we are presently convinced, that there was nothing in the record that justified the al-

lowance of such a prayer for there was not the slightest indication of flight from the jurisdiction, nor was there any suggestion of concealment. However, after having given this abstract suggestion to cover this question of flight, the Court again addresses itself to the question of flight with reference to the petitioner and, having first given the Government's version as to what had occurred, the Court indulged in the following language:

> "He also denies fugitivity. He said he did not run away from here because he committed wrong; that he had had some desire to look about around his home neighborhood with regard to the starting of the practice of law there; that while he was down there he became ill, and that was the reason he did not return promptly. That when Lawyer Wilson up here sent word down that there was some difficulty about this estate money he sent his brother up here to look into the matter, and that he had firmly made up his mind to return, and was in the course of returning, about to get in the automobile when he was arrested by the sheriff, and there was no fugitivity involved.
> "Now, it is for you to decide the facts, which version is correct. If the Government's position appeals to you from the evidence as the correct version, and you find those facts have been sustained beyond which I shall describe to you is known in law as a reasonable doubt, *then it would be your duty to convict.* (Underscore ours).
> "If, on the other hand, you believe the version of the defendant, or, if you have a reasonable doubt about the matter, a reasonable doubt about the strength of the Government's case, then it would be your duty to return a verdict of not guilty."

It is respectfully urged that this last language indulged in by the Court is not the law, nor would it be the duty of the Jury to convict were they even to believe the Government's version as to the flight of the petitioner. The law goes no further than the abstract proposition before referred to, and set up in the Government's prayer, and it cannot in any wise be contended that a belief that a person

fied in and of itself would make it the duty of a jury to convict.

If we take the position taken by the Prosecutor in his Brief, as we understand it, the error is nonetheless there because the language is unquestionably such that the jury would of necessity be confused by the language and could not help but be impressed with the fact that the Court was stating that the belief of the Government's version as to fugitivity in and of itself was sufficient to justify conviction. There could be no better emphasis as to the misleading effect, to say the least, of this charge than the experience in the Chief Justice's Chambers of the Court of Appeals at the time the matter of bond was being discussed when, with respect to this very language, the Chief Justice, upon representation being made of the error in the charge, read the language in the record and asked the prosecutor if he considered that to be the law because it was not his idea of a correct statement of the law, to which the prosecutor responded that the statement was correct if considered in the light of the entire charge. It is respectfully submitted that any statement of this character, so ambiguous as to be susceptible of misinterpretation, amounted to error in an instruction to a jury.

Finally, the Justice of the Court of Appeals observed:

> "... we find from the record that the defendant was not prejudiced by the court's handling of an inquiry addressed to the bench by a member of the jury during the course of the trial. Not only did the court at that time admonish the jurors to hold their questions until the completion of the trial, but counsel for the defense agreed with the court on the procedure to be followed in dealing with this inquiry."

During the trial of this case the Justice of the District Court of the United States called counsel to the Bench and the following ensued (R. p. 143):

> "The Court: One of these jurors sent me a questionnaire which I will have typed and give to you all.

> Apparently it asks for instructions as to certain points of law. . . . The jurors do the craziest things. Of course, they do not know. I think the thing to do is have this typed and give you copies and then can aid me in my instructions on these points. . . .
> "Do you think that is the way to handle it?
> "Mr. Hayes: Yes, sir.
> "The Court: Very well." (R. p. 143)

At the time the Court called our attention to this particular incident counsel had not examined the record nor knew anything about it but what the Court stated. After reading the statement furnished by the Court to counsel, objection was had, requesting the Court to withdraw a juror and declare a mistrial as the very questions themselves showed that the juror was at least biased, if not prejudiced, and had probably already made up his mind. The Court overruled the motion. We feel that there was error in the fact of the original inquiry by the juror, together with the consideration of the content of the questions posed and it is further our opinion that if this were error, that acquiescence on the part of counsel would in no sense cure it. This is the only manner in which there was acquiescence on the part of counsel. The Court did not instruct the jury on this point, except in its charge, coupled with other things, and made this casual and slight observation:

> "He also maintains that the report which was made to the Court with respect to these funds was prepared by his secretary; that he was in general familiar with it, but the details of the report were made up by his secretary, and I may say to you in answer to one of the inquiries that was made by one of your group that if his secretary made up the report which contained an improper statement, and Mr. Dobbins knew nothing whatever about it, he couldn't be held for the wrong . . ."

Certain it is that was not a clearing of the record, nor was there a sufficiency in that statement to eliminate the bias or prejudice in the juror's mind which had been disclosed by the inquiry. To say that counsel entered into an

agreement or bargain with the Court that a thing improper in a case had taken place before counsel had an opportunity to understand and study the question, and with regard to a promised procedure made by the Court that it would straighten out the matter in its charge, which promise was not kept, adversely affecting the rights of the defendant, petitioner here, is to reduce the law to a mockery and to violate the inherent rights of the petitioner.

A very similar situation and the attendant decision with regard thereto is found in the case of Chester G. Bollenback v. United States, decided by this Court January 28, 1946, from the pertinent facts and decision of the Court we quote as follows:

> "The question is whether he was properly convicted under the indictment. * * * Interchanges then ensued between the court and jury and between court and counsel. One of the jurors asked: 'Can any act of conspiracy be performed after the crime is committed?' The trial judge made some unresponsive comments but failed to answer the question. * * * After an exception was then taken and allowed, the judge 'mistakenly replied,' as the lower court noted, 'that he had already told them that there could be no conspiracy after the object of the conspiracy had been attained.'
>
> "After indulging in further colloquy with counsel, not here pertinent, the judge stated that he had this note of inquiry from the jury: 'If the defendant were aware that bonds which he aided in disposing of were stolen does that knowledge make him guilty of the second count.' In answer the judge instructed the jury as follows: 'Of course if it occured afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the conclusion by you jurors of knowledge by the possessor that the property was stolen. * * *
>
> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. * * * The influence of the trial judge on the jury is necessarily and properly of great

> weight, * * * and jurors are even watchful of the words that fall from him. *Particularly in a criminal trial, the judge's last word is apt to be the decisive word.* If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge. * * * When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be 'quite cursory' in the circumstances in which the jury here asked for supplemental instruction. But he was not even 'cursorily' accurate. He was simply wrong."

By way of summary, and as a matter of emphasis on the fundamental question of demand as it reflects itself in the facts in this case, attention is called to the following:

Mrs. Jones was appointed committee of the estate of her father and as such, the checks came to her in her official capacity, she of her own accord turned over the greater number of these checks, less $15, to the petitioner for subsequent proper accounting until such time as she might call upon him to turn over same to her. The fact that out of each of these checks she received $15 is proof positive that she was cognizant of the fact that the checks were not being deposited as drawn. The last check of $71.47 that came to her was returned by her to the Government because she knew she was not in a capacity to accept same. Thereafter petitioner made application as her attorney to have her appointed administratrix so that the proper accounting might be made to her in her proper capacity as administratrix of her father's estate.

It is to be noted in this connection that until such time of qualification, Mrs. Jones was not in a position legally to have received or accepted the money. Mrs. Jones was herself the one solely entitled to this money, and it was only the necessity of the legal formality in order that the same might be turned over to her. With a definite understanding on her part as to the condition in which the money was turned over to the petitioner, and with no complaint made by her nor any

demand made by her, it is thus inconceivable how embezzlement can possibly be spelled out of these circumstances. If this be true, any lawyer with a practice beyond the contingencies of the criminal branch of the Municipal Court would be rendered liable without defense and without complaint by the person with whom he had dealt to arrest, prosecution and conviction of the offense of embezzlement.

This is a proper recital of the facts as actually adduced at the trial of this cause, and it is respectfully submitted that it was the duty and obligation of the trial court, as a matter of law on the question of embezzlement, to have instructed the jury that under these circumstances that their verdict should be that of "not guilty" on the counts of embezzlement.

The petitioner in this case is a member of the bar and certain public relations must be considered and certain fundamental individual rights become a part of the picture. As was said by Mr. Justice Rutledge and concurred in by Mr. Justice Murphy, in the Yamashita case—

> "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself."

We do appreciate the fact that we are treading on delicate ground in view of the fact that this Court has said in several cases, the latest being Fisher v. United States, decided June 10, 1946, and appearing in the Advance Sheets of the United States Supreme Court, 1945-6, page 1086—

> "Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.
> "Where the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere."

Nonetheless in the matter of the allowance of a write of certiorari it has been held, in the case of Halinger v. United States, 146 U. S. 314, 36 L. Ed. 986, that this Court may inquire upon review of proceedings of a criminal case, whether the accused has been convicted by—"due process of law within the meaning of the Fifth and Fourteenth Amendments to the Constitution."

We respectfully submit an egregious error has been committed in that a wrong interpretation is being made of the statutes hereto referred to, and that the court, without so saying, is overruling its position had in a long line of cases of embezzlement as well as being in conflict with practically all the Federal as well as State courts, throughout the land.

It is respectfully submitted that there is in this instance no question of a choice made by the Court of Appeals for the District of Columbia between conflicting legal conclusions, but rather a taking of position in the teeth of uniform authorities throughout the country.

CONCLUSION.

Wherefore, it is respectfully submitted that a writ of certiorari should issue from this Court to the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 420

NATHAN A. DOBBINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 276–281) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 28, 1946 (R. 282), and a petition for rehearing was denied July 22, 1946 (R. 283). The petition for a writ of certiorari was filed August 20, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13,

1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether, in order to establish the offense of embezzlement, the Government must show that a demand had been made for the return of the funds entrusted to the defendant.

2. Whether the trial court erred in failing to direct a verdict for petitioner after the prosecuting attorney's opening statement, because he had not stated specifically that the taking or conversion was done with wrongful or fraudulent intention.

3. Whether the trial court erred in not requiring the Government to elect at the outset of the trial whether it would proceed on the embezzlement, larceny after trust, or false pretenses counts of the indictment.

4. Whether the trial court erred in the admission of testimony.

5. Whether the trial court erred in its instructions to the jury.

STATUTES INVOLVED

Section 22–1202 of the District of Columbia Code (1940) provides:

> If any agent, attorney, clerk, or servant of a private person or copartnership, or any officer, attorney, agent, clerk, or servant of any association or incorporated

company, shall wrongfully convert to his own use, or fraudulently take, make way with, or secrete, with intent to convert to his own use, anything of value which shall come into his possession or under his care by virtue of his employment or office, whether the thing so converted be the property of his master or employer or that of any other person, copartnership, association, or corporation, he shall be deemed guilty of embezzlement, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment for not more than ten years, or both: *Provided, however,* That where the thing, evidence of debt, property, proceeds, or profits be of the value of not more than thirty-five dollars, the punishment shall be by imprisonment for not more than one year or a fine of not more than five hundred dollars, or both.

Section 14–307 of the District of Columbia Code (1940) provides:

> In neither civil nor criminal proceedings shall a husband or his wife be competent to testify as to any confidential communications made by one to the other during the marriage.

STATEMENT

On December 20, 1944, petitioner was indicted in the District Court for the District of Columbia

on 69 counts charging embezzlement, larceny after trust, and false pretenses (R. 4–7).[1]

At the close of the opening statement by the attorney for the Government (R. 14–17), petitioner moved for a directed verdict on the ground that even if everything there stated were proved, the offenses charged in the indictment would not be established, since it was not asserted that any demand had been made upon petitioner for the return of the funds that had been entrusted to him (R. 17–18). The motion was overruled (R. 18), and at the same time the court overruled petitioner's motion to require the Government to elect at that time whether it would proceed on the embezzlement, false pretenses, or larceny after trust counts (R. 18–19). At the conclusion of the Government's case, on petitioner's motion and with the consent of the Government, the counts charging false pretenses and larceny after trust were stricken (R. 9, 95–96). Petitioner was found guilty on all 23 embezzlement counts (R. 10), and he was sentenced generally to imprisonment for a period of 4 to 15 months (R. 12). On appeal to the United States Court of Appeals for the District of Columbia, the judgment was affirmed (R. 282).

[1] The indictment alleged 23 separate transactions, each of which was charged alternatively as embezzlement, larceny after trust, and false pretenses. The printed record before the Court contains only the first three counts, which are typical of all 69 counts (R. 4–7; see also R. 256–257).

The evidence in support of the Government's case may be summarized as follows:

Petitioner was attorney for one Josephine Butler, who was committee of the estate of her husband, William Butler, a lunatic (R. 24–25). In 1941, after the death of Josephine Butler, her daughter, Grace L. Jones, was appointed as substitute committee of the William Butler estate (R. 25–27). Petitioner continued as attorney for the committee of the estate, and acted as such at all times in question here (R. 25–28, 95–96). Between December 1941 and January 1944, certain monthly checks (Government retirement checks payable to William Butler) were received by Grace L. Jones as committee, and entrusted by her to petitioner as her attorney (R. 29–30, 32, 33–34, 95–96).[2] It was shown that petitioner

[2] At the close of the Government's cases the following colloquy occurred among the trial judge, petitioner's counsel (Messrs. Hayes and Cobb) and the prosecutor (Mr. Jenkins) (R. 95–96):

"The COURT. As to saving a little time, have you any theory on which you can go to the jury on false pretenses.

"Mr. JENKINS. No.

"The COURT. All right. A motion to strike, then, I suppose, those counts will be granted.

* * * * *

"Mr. HAYES. I think from our point of view the question of the actual receipt of the money, the testimony so far would be she indicated he was her attorney, and it was on that theory she turned it over to him.

"The COURT. And you didn't raise any question in your own case, or in your own argument he didn't receive that in that capacity.

led Mrs. Jones to believe that the checks were being deposited in a local bank in her name as committee of the estate (R. 30–32, 99, 221). Petitioner himself testified that when Mrs. Jones became committee and brought one of the first checks to him, he told her "that during her father's lifetime she had no right to spend any funds from his estate without an appropriate order of the Court," and "that I had planned to 'open an account in your name at the Industrial Bank * * *'" (R. 99). Mrs. Jones testified that petitioner "said in fact the check was to be deposited in the bank in my name as committee of the estate" (R. 30). In addition, the Government introduced into evidence annual reports of the committee of the estate to the office of the auditor of the district court which had been prepared in petitioner's office and purported to

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"Mr. HAYES. I think not.

"Mr. COBB. I think not.

"The COURT. We are all agreed on that.

"Mr. JENKINS. It would be inconsistent to the larceny counts if that is conceded.

"The COURT. That is what I am talking about. In other words, in view of the stipulation, have the only counts we have remaining in the case, the embezzlement counts.

"Mr. JENKINS. That is so, I think.

"The COURT. You make that motion in the light of that stipulation on your part that he received these moneys as attorney of the estate, see? In view of that, if you move to strike out all larceny after trust, I will grant the motion.

"Mr. HAYES. We do.

"The COURT. Then that is cleared up."

See also instructions to jury at R. 258–259.

show substantial deposits to the credit of Grace L. Jones, Committee, in a local bank (R. 36–37, 177–179). It was proved that there never had been such an account in this bank (R. 75). Petitioner denied responsibility for these false statements in the reports and attempted to place responsibility on his secretary (R. 108–109).[3] However, his secretary testified that this information was given to her by petitioner for insertion in the reports (R. 179). Instead of depositing the checks in a bank account for Grace L. Jones as committee of the estate, petitioner admittedly commingled them with his personal funds (R. 18, 19). Some of the checks were deposited in petitioner's personal bank account (R. 76, 84), which was thereafter depleted (R. 74), and others were cashed in liquor stores (R. 57, 58–60) and other commercial establishments (R. 61, 62).

[3] At one point, in answer to the question, "Who put down in this account the amount carried on deposit in the Industrial Bank of Washington, $1,868?", he answered, "It was partly through Mrs. Jones, and partly through me. I mean there was a mutual understanding between both of us as to that insertion in the account" (R. 132). However, Mrs. Jones testified that the reports were fully prepared when she went to petitioner's office and that she merely signed them (R. 69–70). At another point petitioner stated that everybody in his office knew that there was no such bank account (R. 137). He further testified that in the normal course of business his secretary would make up such reports from the files in his office, and said she must have gotten the data as to the bank account from the files, but admitted that for some reason he had not been able to find all of the records in the Grace Jones file (R. 130).

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The evidence further showed that during the period in which petitioner was commingling funds of the committee with his personal funds, his personal financial condition was seriously impaired. For example, it was shown that his personal checking account was overdrawn in December 1942 (R. 84) and insufficient in January 1944 to cover the amount then due the estate (R. 75). It was also shown that between 1940 and September 1944 petitioner repeatedly borrowed money from finance companies, banks, and personal acquaintances (R. 227, 242–243, 248, 255.) He obtained at least six loans on an automobile owned by him, the last for $2,074.50 in September 1944 (R. 245–247). He was not able to repay that loan, and the car was repossessed by the finance company (R. 247). After his indictment and arrest in December 1944 his family had to execute a mortgage on the estate of his father to raise the required $5,000 bond (R. 197–203). Shortly after his arrest petitioner stated to a police officer that his family was raising money to take care of his problems (R. 87).

In February 1944, petitioner was advised of the death of William Butler, which had occurred the preceding month (R. 110), and he then filed a petition to qualify Mrs. Jones as the administratrix of the estate (R. 110–111). At that time petitioner knew that he would have to make an accounting of the funds being held for the com-

mittee of the estate; he admitted that he was advised at the time, by a representative of the company which had previously bonded Mrs. Jones as committee, that there would be a hearing on the matter before the auditor (R. 111). Shortly thereafter, on March 30, 1944, the office of the auditor of the district court sent notices by registered mail to petitioner and Mrs. Jones of a hearing for the purpose of an accounting of the funds of the committee of the estate of William Butler, but the letter to petitioner was returned by the post office because he could not be found (R. 88–89). In October 1944, an investigator of the real estate commission was unable to locate petitioner (R. 90), and an investigator of the United States Attorney's office assigned to this case was unable to find him in the city prior to the grand jury proceedings in December 1944 (R. 92–93). Petitioner testified that from March to November 1944 he was at his office at least two or three times each week (R. 141), and that in the latter month he left Washington for his home in South Carolina (R. 114). He stated that he told his secretary and a Mr. Logan, with whom he shared offices, that he was going home, but admitted that he did not leave a specific forwarding address (R. 170). However, a police officer who contacted Mr. Logan in an attempt to locate petitioner prior to the grand jury proceedings testified that Mr. Logan told him he did not know where petitioner was

at that time (R. 93). And petitioner admitted that no mail was forwarded to him in South Carolina (R. 171). He testified that he had gone down to South Carolina to investigate the possibility of practicing there and that his intention to stay only a few weeks was upset by the fact that he became quite ill and was confined until early in January 1945 when he returned to Washington to answer the indictment (R. 114–115).

ARGUMENT

1. The principal contention urged here, as in the court below, is that embezzlement is not established, where no time is specified for the return of the funds entrusted, unless it is alleged and proved that there was a demand for the return of the funds and that the demand was not met. This was the sole basis of petitioner's motion for a directed verdict made at the close of the Government's opening statement (R. 17–18; see p. 4, *supra*), and it is the basis of petitioner's claims here that the court erred in denying that motion and in refusing to grant his requested instruction to that effect (Pet. 8–9, 22–28, 34–36). We think the court below was clearly correct in rejecting this view of the law (R. 279–280).

Embezzlement is established by proof that the funds came into the defendant's possession under circumstances which created a fiduciary relationship and that there was a breach of trust or

wrongful appropriation to the defendant's use. *Moore* v. *United States,* 160 U. S. 268, 269; *Weinhandler* v. *United States,* 20 F. 2d 359, 361 (C. C. A. 2), certiorari denied, 275 U. S. 554; *Hancey* v. *United States,* 108 F. 2d 835, 837–838 (C. C. A. 10); *Wilcox* v. *Commissioner of Internal Revenue,* 148 F. 2d 933, 934 (C. C. A. 9), affirmed February 5, 1946, No. 163, O. T. 1945. The crime is complete as soon as the wrongful appropriation occurs. *Wilcox* v. *Commissioner of Internal Revenue, supra;* Underhill's *Criminal Evidence* (4th Ed.) § 491, p. 1009. And the fact that restitution is made or intended does not absolve the wrongdoer. *Hancey* v. *United States, supra; Henry* v. *United States,* 273 Fed. 330, 339 (App. D. C.), certiorari denied, 257 U. S. 640; *State* v. *Baxter,* 89 Ohio St. 269. Thus, (a demand and refusal to pay are not elements of the offense, but merely constitute one type of evidence by which it might be proved, though it can be established without such evidence. *People* v. *Crane,* 34 Cal. App. 599, 610–611; *State* v. *Baxter, supra,* at 284–285; Underhill's *Criminal Evidence* (4th Ed.) § 493, p. 1010. The authorities cited by petitioner do not support his contention. 'To the contrary, in *State* v. *Reynolds,* 65 N. J. L. 424 (see Pet. 24–25), the conviction was upheld in the absence of proof of a demand, and the opinion specifically stated that "a demand is only one class of evidence for proving fraudulent conversion." 65 N. J. L. at

430. In *People* v. *Page,* 116 Cal. 386 (see Pet. 24), the decision was predicated on the absence of any evidence whatsoever of intent to convert. The reference in the opinion to the absence of a demand must be read together with an earlier reference, immediately preceding the portion of the opinion quoted in the petition, to the absence of other evidence "that the defendant ever spent, wasted, or appropriated to his own use any of the money of his ward." 116 Cal. at 395.[4]

There was ample evidence here that petitioner intended to and did fraudulently convert the funds of the committee to his own use. Thus it was shown that while he led Mrs. Jones to believe that he was depositing the funds in a bank account in the committee's name, he in fact immediately commingled them with his personal funds and used the money for personal purposes, knowing that, as he had advised Mrs. Jones, the committee funds could not be spent without court authority. It was also shown that throughout the period Mrs. Jones entrusted committee funds to him, petitioner was in poor financial condition, and that he was responsible for false reports to the auditor's office purporting to show that the com-

[4] The California decisions uniformly hold that proof of a demand is not essential to a conviction for embezzlement. See, e. g., *People* v. *Crane*, *supra; People* v. *Foss*, 7 Cal. 2d 669; *People* v. *Hill*, 2 Cal. App. 2d 141; *People v. Wiezel*, 39 Cal. App. 2d 657.

mittee's funds were secure in a local bank. These circumstances, coupled with petitioner's departure from Washington at the time the auditor's office was checking the accounts of the committee, were more than sufficient to establish a fraudulent and wrongful conversion. See Wharton's *Criminal Law* (11th ed., 1912), Vol. II, § 1300.

2. Petitioner also urges that the trial court erred in failing to direct a verdict for him at the close of the prosecuting attorney's opening statement, because it was not expressly stated therein that the conversion was with "wrongful" or "fraudulent" intent and, therefore, the charges in the opening statement, even if proved, would not establish the offense (Pet. 19–21). This contention would appear to be foreclosed in view of the fact that the motion was predicated exclusively on the ground that the offense could not be established unless a demand were alleged and proved (see R. 17–18).[5]

In any event, there is no merit in the contention. A motion for directed verdict normally cannot be directed to the sufficiency of the opening argument. See *McGuire* v. *United States*, 152 F. 2d 577, 580 (C. C. A. 8); *Rose* v. *United States*, 149 F. 2d 755, 758 (C. C. A. 9). The authority

[5] The record does not support petitioner's implication that the failure to state that petitioner had a "wrongful" or "fraudulent" intent was "called to the attention of the court and of the prosecutor" (see Pet. 21).

to direct a verdict upon the opening statement "should be exercised only when it clearly and affirmatively appears from the opening statement that the charge against the defendant cannot be sustained under any view of the evidence consistent with the statement." *McGuire* v. *United States, supra,* at 580. The opening statement here was not thus vulnerable. The fact that the prosecuting attorney did not employ the meticulous language of the indictment—and there is no complaint here that the indictment itself was insufficient—is of no moment since the statement in substance set forth *seriatem* acts which, if proved, would establish the offense of embezzlement (see R. 14–17), and the omission of the particular words "fraudulent" or "wrongful" did not in any way prejudice petitioner in making his defense. Moreover, even if the opening statement were to be tested by the same standards as are applicable to an indictment, it was sufficient. The prosecutor commenced and concluded the statement with the assertion that the Government would establish that petitioner had by the acts which the prosecutor recited committed the crime of embezzlement. This use of the word embezzlement itself implied fraudulent conduct by petitioner, and the addition of the words "fraudulent" or "wrongful" would not have enlarged or restricted its signification. *Grin* v. *Shine,* 187 U. S. 181, 189; *Weinhandler* v. *United States,* 20 F. 2d

359, 361 (C. C. A. 2), certiorari denied, 275 U. S. 554; *United States* v. *Mason*, 177 Fed. 552, 558 (C. C. D. Mass.), affirmed, 218 U. S. 517.

3. Petitioner argues that the trial court erred in not requiring the Government at the outset of the trial to elect to proceed on the embezzlement, false pretenses, or larceny after trust counts (Pet. 21–22). We think the court below gave a conclusive answer to this contention (R. 278):

> * * * we do not think the trial court erred in refusing the defendant's motion that the Government be required to elect to place its case on one of the three crimes charged before putting in evidence. This is a matter within the discretion of the trial court and its ruling was not an abuse of that power. As for any confusion which might have existed as a result of the prosecution being allowed to put in its case before making an election, we think it was well dispelled by the election at the end of the Government's case and by the instructions to the jury. There is nothing to indicate that the defense was in any way damaged by this ruling of the trial court.

As a matter of fact, the Government was in no position to make such an election until it could determine from the evidence the precise character of petitioner's relation to Mrs. Jones when he received the committee funds. It was only after the Government's case was in and petitioner

stipulated that he received the moneys as attorney for Mrs. Jones as committee of the estate (R. 19) that the Government was able to determine, as it then did, that it was necessary only to proceed on the embezzlement counts (see fn. 2, pp. 5–6, *supra*).

4. Petitioner argues that the testimony of his former wife relative to statements he made to her during their marriage as to his need for money should not have been admitted because the disclosures were confidential and, therefore, privileged (Pet. 28–31). However, the record does not show that petitioner objected to the admission of this testimony or that he claimed a privilege against permitting his former wife to testify as to these matters (see R. 227–231). Under such circumstances, the privilege, if any, must be deemed to have been waived. See *Steen* v. *First Nat'l Bank,* 298 Fed. 36, 41 (C. C. A. 8); *Proffitt* v. *United States,* 264 Fed. 299, 302–303 (C. C. A. 9); VIII Wigmore on *Evidence* (3d ed.) §§ 2242, 2340. Moreover, the testimony in question discloses on its face that the communications related only to petitioner's need for money, which he disclosed to his wife in order to induce her to borrow money from her mother and others on his behalf. Petitioner therefore contemplated that his disclosures would be passed on to third persons, so that they cannot be said to have been confidential. Cf. *Wolfle* v. *United States,* 291 U. S. 7; *Yoder* v. *United States,* 80 F. 2d 665, 668

(C. C. A. 10); *United States* v. *Mitchell,* 137 F. 2d 1006, 1009 (C. C. A. 2), certiorari denied, 321 U. S. 794; VIII Wigmore on *Evidence* (3d Ed.) § 2336. Hence, the communications were not within the privilege available under Section 14–307 of the District of Columbia Code (*supra,* p. 3).

Petitioner also objects to the admission of evidence as to his financial condition prior to and after the return of the indictment, but he refers specifically only to the testimony of one Nolan, an employee of a finance company, that the company repossessed his car when he failed to repay an outstanding loan; he states that "in truth and fact it was disclosed on cross examination the car was turned over to him [Nolan] after the indictment had been had and petitioner returned to the city without the slightest importunities or litigation" (Pet. 32–33). However, Nolan's testimony, both on direct and cross examination, was that the car was repossessed, not surrendered voluntarily, and that it was sold to satisfy the outstanding loan (R. 247). This testimony was but a part of the evidence showing petitioner's continuing financial disability throughout the entire period of his relations to the committee of the estate. Such evidence tended to establish that petitioner was in great need of money and that, therefore, there was both motive and intent for his embezzlement of the funds entrusted to

him. Its relevance was, therefore, obvious and its admission proper.

5. Petitioner contends (Pet. 14, 33–34) that the trial court was not warranted in instructing the jury that if they believed that he "was the attorney of Grace L. Jones, as committee of the estate of William Butler," and came into the possession of money belonging to the committee by virtue of such employment and that he wrongfully converted such money to his own use, they should find him guilty of embezzlement (see R. 260), because the evidence was uncontradicted that he did not come into possession of the money as attorney for Grace L. Jones, as committee, but that he accepted custody of the money purely as a favor and for safekeeping. While the evidence clearly supports the instruction (see pp. 5–6, *supra*) it is unnecessary to present a detailed analysis, since it was stipulated at the trial by counsel for petitioner that he received the funds as attorney for the committee of the estate (see fn. 2, pp. 5–6, *supra*; see also R. 19).

Petitioner also complains (Pet. 36–38) of the court's instruction that evidence indicating a flight from justice is admissible as evidence of consciousness of guilt, that it was for the jury to determine whether petitioner fled the jurisdiction to escape prosecution, and that they could "consider this along with other evidence in the case with respect to the alleged guilt of the defendant" (R. 264). Petitioner argues that while, as an abstract propo-

sition of law, this instruction may have been correct, there was not the slightest indication of flight in the evidence, so that the instruction was not justified. However, as we have shown in the Statement, *supra*, pp. 8–10, there was abundant evidence indicating that petitioner fled from the District of Columbia to avoid an accounting of the funds of the committee of the estate. Thus, the record shows that the auditor's office and the district attorney's office made numerous attempts to locate petitioner in connection with this investigation, that although petitioner claimed he was in the city and at his office frequently, they were not able to find him, and that petitioner did not leave the city until he learned of the forthcoming investigation by the auditor.

In this connection, petitioner quotes a part of the charge in which the judge referred to petitioner's explanation of his fugitivity and then stated that it was the duty of the jury to convict or acquit, depending upon "which version" it chose to believe (see R. 267–268). On the basis of this abstraction of a part of the charge from its context, petitioner makes the unwarranted argument that the court permitted the jury to convict or acquit solely on its determination whether petitioner fled from justice (Pet. 37–38). A reading of the entire charge, however, makes it apparent that the last two paragraphs of the quotation set forth in the petition, relating to the duty of the jury to convict or acquit depending

upon "which version" it accepted, was intended to apply and must have been understood by the jury as applying to the whole case, both for the prosecution and for the defense, which the court had reviewed and summarized in the instructions preceding that part relating to fugitivity. This is also apparent from the fact that in other parts of the charge the court stated that the evidence as to flight was to be considered "along with other evidence in the case" and that "The mere fact of flight does not in and of itself raise a presumption of guilt. It must be taken into consideration, if at all, by you in connection with the other facts in the case" (R. 264).

6. Finally, petitioner contends that the trial court erred in its handling of a communication received from a juror during the course of the trial and in refusing to declare a mistrial because of such communication (Pet. 38–41). Toward the close of the prosecution's case, one of the jurors sent a note to the judge asking for instructions on the following points of law (R. 143):

> * * * According to law can a juror find defendant not guilty solely on grounds that all money was refunded?
>
> "Is an employer (defendant) responsible for the acts of an employee (person or persons who collected checks and typing of statements)?
>
> "When lawyer draws up papers (whether fraudulent or not) and signed by someone

else, who assumes responsibility? (Signer is ignorant of law; so hires lawyer.)

Petitioner asserts that this inquiry shows that the juror was "biased, if not prejudiced, and had probably already made up his mind" (Pet. 39). We submit that the questions raised by the juror do not warrant petitioner's conclusion; they appear to be no more than an expression of the natural and reasonable inquisitiveness of a layman concerning the matter on trial. Counsel for petitioner agreed with the court, at the time counsel was advised of the communication and its contents, that the best course to follow was not to tell the jurors anything until all the evidence was in and then, with the aid of counsel, frame instructions on the points mentioned in the note (R. 143). We submit that the fact that petitioner's counsel delayed making the motion for mistrial until later in the trial (R. 168) indicates that he was not overly concerned about the note and that the motion was mere afterthought. In any event, a motion for a mistrial is addressed to the sound discretion of the trial court, and it cannot be said that there was an abuse of this discretion here. Cf. *United States* v. *Hirsch,* 74 F. 2d 215, 219 (C. C. A. 2), certiorari denied, 295 U. S. 739. We agree with the court below that the trial judge handled the matter judiciously by telling the jury immediately that he would instruct them fully after all the testimony was in and that it was improper for

them to ask for instructions as to certain points of law before that time (R. 143–144), and by subsequently giving the jury complete and proper instructions on all the questions involved in the case, including those raised in the juror's communication (see R. 266–267). For this latter reason, this Court's recent decision in *Bollenbach* v. *United States,* 326 U. S. 607, which petitioner attempts to invoke (Pet. 40–41), obviously is not apposite.

CONCLUSION

The decision below is correct, and presents no question of importance or conflict of decisions. The petition for a writ of certiorari should therefore be denied.

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